UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BIG BEND, MINN.
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DATE May 27, 1982

SUBJECT Lead and Barite Tailings Piles on the Big River

FROM Jane B Werholtz Jane B Werholtz
Office of Regional Counsel

TO Timothy L Amsden
Director, Special Projects

Your memo of April 27, 1982 poses a possible scenario and question regarding the lead and barite tailing piles on the Big River The question is can Superfund recoup actions be used to collect expenses incurred by the federal government, specifically the U S Army Corps of Engineers, from other than Superfund monies First, please note that the question of whether lead and barite tailings fall within the scope of Superfund is a preliminary question which should be asked and answered However, the scenario you provide assumes that the site is fundable under Superfund

As to the specific question you raise, the law is not clear Section 107(a) states that a person is liable for "all costs of removal or remedial action incurred by the United States Government or a state, not inconsistent with the National Contingency Plan" notwithstanding any other provision or rule of law This language is very strong and suggests an affirmative answer to your question However, a review of the legislative and political history of CERCLA suggests that Section 107, the liability provision was not intended to create a federal common law for hazardous waste cleanup Instead, the strict liability provision of Section 107 was struck as a political compromise Strict liability was accepted if the authority for its application was limited by the CERCLA legislation (Section 104) to the fund Furthering this argument is one which suggests that Section 107 is closely tied to Section 104, response authorities, in that Section 107 references costs for "removal or remedial action," terms specifically defined by CERCLA The argument would be that the strict liability provisions of Section 107 could only be used when response actions taken under Section 104 were utilized As you are aware, Section 104 and E O 12316 place certain limitations on response authority which might prevent Corps cleanup

From a historical perspective, this agency did advise people prior to CERCLA authorization (when only RCRA money was available) that the agency would use 107 authority to pursue recoupment of cleanup costs However, that "threat" was never implemented so the issue has not been legally contested and resolved

I have discussed this issue with Dan Berry of the Office of Regional Counsel Berry concurs with the conclusion that Section 107 may arguably be used as a legal foundation for cost recovery but there is no clear guarantee that the Corps of Engineers will be successful in recouping expenses

6/18/82

DRAFT

Draft-SEA Issues and Commitments

1 Missouri - Lead and Barite Mine Tailings on the Big River-especially at Desloge

The Big River is contaminated ~~and threatened~~ by ~~the existence of~~ a number of lead and barite mine tailings and dams The area affected is large, and the consequences to the pollution are significant, as the Big River drains into the Meramac River, which is the first priority river segment under the new Missouri segment prioritization process

Among possible commitments are

a EPA- conduct a study to determine whether or not the sanitary landfill currently in operation on the Desloge Tailings pile is creating a leachate problem

b Both Agencies - monitor closely the progress of the proposed Corps of Engineers Pine Ford Reservoir Project

c Both Agencies - investigate the eligibility, feasibility and desirability of designating the area as a Superfund candidate

d Both Agencies - work closely and in conjunction with the Corps of Engineers to develop a long-range plan for monitoring the problem and mitigating it (including, perhaps, consideration of possible notification of parties for purposes of perfection of Superfund recoupment)

2 Iowa and Missouri - In Missouri, there has been a history of lagoon failure in areas underlain with karst topography. Iowa also has karst topography, and is currently conducting a study to determine the extent of the karst topography and the appropriateness of lagoons and other treatment technologies in those areas where karst exist The problem is that lagoon failure or failure of some other technology/allows wastewater or waste material to go into the ground places the waste material directly into groundwater, which flows through the porous limestone karst substructure